84-317

Office - Supreme Court, U.S
FILED
AUG 27 1984
ALEXANDER L. STEVAS
CLERK

RECORD NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

ROBERT GREGORY WRIGHT

Petitioner

V.

COMMONWEALTH OF VIRGINIA

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT GREGORY WRIGHT
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v.

COMMONWEALTH OF VIRGINIA
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, ROBERT GREGORY WRIGHT, petitions for a writ of certiorari to review a judgment of the Supreme Court of Virginia as follows:

1. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Is evidence of a gun unquestionably owned by someone other than

the accused found in the glove compartment of the car owned and operated by the accused sufficient under Section 1 of XlV Amendment of the U.S. Constitution to convict the accused of knowingly and intentionally possessing or transporting the gun found in the glove compartment of the automobile?

(2) Is a conviction by jury trial valid under Section 1 of XlV Amendment of the U.S. Constitution when witnesses were sequestered but an agent of the prosecution recorded testimony of defense witnesses by a tape recording device and then delivered this device to a sequestered witness for the prosecution who testified in rebuttal even though there was no proof the rebuttal witnesses listened to and used the recording for their rebuttal testimony?

(3) Does Amendment lV of the U.S. Constitution prevent a police officer from searching the interior of an automobile

including the glove compartment when he arrests the driver for a past misdemeanor pursuant to an arrest warrant not in hand at the time when the driver is no longer in the car and when the driver is making arrangements for another to drive his car home?

(4) Is the appropriate statute proscribing felons from possessing and transporting a firearm intended to have only prospective application as to who are proscribed felons thereby eliminating the need to determine if the statute is an ex post facto law?

(5) If the statute defining who are proscribed felons has retrospective application, is it an ex post facto law in violation of Article 1, Section 10, Clause 3 of the U.S. Constitution?

11. NAMES OF PARTIES

The names of all the parties are listed in the caption. The Petitioner is

Robert Gregory Wright, 1012 Forest Park Boulevard, Northwest, Roanoke, Virginia, 24017 and the Respondent is the Commonwealth of Virginia, c/o Donald S. Caldwell, Commonwealth Attorney for the City of Roanoke, Roanoke City Courthouse, 315 Church Avenue, Southwest, Roanoke, Virginia. If this petition is granted, counsel for the Respondent will be Gerald L. Baliles, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.

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IV. REFERENCE TO REPORTS OF OPINIONS

By judgment on June 28, 1984, the Supreme Court of Virginia denied a petition for appeal of a judgment of the Circuit Court of the City of Roanoke on July 19, 1983 convicting the Petitioner of a crime; and consequently no opinion was rendered or reported in an official or unofficial report.

V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds that the Petitioner was convicted by a state court of a crime when the evidence was illegally obtained in violation of his rights guaranteed by Amendment IV of the Constitution of the United States of America made applicable to the state court proceedings by Section 1 of Amendment XIV of said Constitution and when the evidence and proceedings in said state court failed to follow adequate standards of due process required by Section 1 of Amendment

XlV of said Constitution and where the conviction was pursuant to criminal statute which is an ex post facto prohibited by Article 1, Section 10, Clause 3 of said Constitution; and

1. The judgment sought to be reviewed was made and entered by the Supreme Court of Virginia on June 28, 1984 denying a petition for appeal of a judgment by the Circuit Court of the City of Roanoke on July 19, 1983 convicting the Petitioner of feloniously, knowingly and intentionally possessing and transporting a pistol after having been previously convicted of a certain felony in violation of Va. Code § 18.2-308.2; and

2. An order of the Supreme Court of Virginia was entered on August 2, 1984 staying its judgment on June 28, 1984 denying the petition for appeal as aforesaid in order to permit the Petitioner to have reasonable time and opportunity to apply to this Court for a writ of certiorari

to review the aforesaid judgment of that court; this stay is effective until September 26, 1984, and if by that time, the case has been docketed in this Court, thereafter until final determination by this Court; and there has been no application for a rehearing by the Supreme Court of Virginia and its judgment on June 28, 1984 is the final adjudication by the highest court of the Commonwealth of Virginia concerning the subject matter in controversy; and

3. The statutory provision believed to confer jurisdiction on this Court to review the final judgment in question by writ of certiorari is 28 U.S.C. §1257 (3). The Petitioner might at his option have sought review by appeal pursuant to 28 U.S.C. § 1258 (2) on the issue of whether the statute is an ex post facto law; but because other federal questions are presented, review is sought by a writ

of certiorari.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved by this petition are:

1. Article 1, Section 10, Clause 3 which is as follows:

> "No state shall ... pass... ex post facto law...."

2. Amendment IV which is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

3. The second clause of the second sentence of Section 1 of Amendment XIV which is as follows:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law;"

The criminal offense hereby involved is defined by Va. Code § 19.2-97 enacted in

1979 and is as follows:

> "It shall be unlawful for any person who has been convicted of a felony involving the use of a firearm under the laws of this State, or any other state, the District of Columbia, the United States or any territory thereof, to knowingly and intentionally possess or possess any pistol, revolver or other handgun. [An 1982 amendment effective after the date of the offense on June 2, 1982 substituted "Class 1,2 or 3 felony of a felony" for "felony" and other language not material.]

V11. STATEMENT OF THE CASE

The following is a concise statement of the case confined to the questions presented. Numbered page references to the transcript of the proceedings in the Circuit Court of the City of Roanoke [hereby referred to as the "trial court"] are proceeded by the letter and hyphen "T-"; and numbered page references to the record from the clerk of the trial court are proceeded by the letter and hyphen "R-". The Petitioner is referred to as "Wright" and the

Respondent as "Commonwealth".

A. MATERIAL PROCEEDINGS

After a warrant of arrest was dismissed at a preliminary hearing, Wright was indicted by grand jury on August 2, 1982 [R-1]; and he made a motion for bill of particulars to show the dates of the offense and the conviction but prior to enactment of Va. Code § 18.2-308.2 [T-2] in order to lay the foundation for motions in bar alleging the statute has only prospective application and alleging the statute is an ex post facto law if it has retrospective application. The bill of particulars [R-7] states Wright was convicted on November 15, 1978 for a felony involving use of a firearm on June 10, 1978. On September 10, 1982, the trial court directed briefs arguing these positions without the necessity of a formal response to the motion for bill of particulars and formal motions to dismiss [T-1 through 5]. After detailed

briefs concerning whether the statute should have prospective or retrospective application and whether the statute if applied retrospectively would be an ex post facto law, the trial court on January 3, 1983 overruled such motions [T-6; R-9]. At such time, Wright indicated he wished to move prior to the trial for suppression of certain evidence; and evidence on this motion was heard on February 2, 1983 [T-8 through 35; R-11] and on February 4, 1983 [T-36 through 68; R-13]; and a schedule for filing briefs was fixed and the case continued [R-13]. The motion to suppress was overruled but it does not appear in the record except by the introduction of evidence at the trial.

Wright was tried by jury on July 19, 1983; various objections and exceptions were made throughout the trial to the evidence and the instructions of the Court; and the jury found Wright guilty and fixed

his punishment at five years in the penitentiary [T-69 through 194; R-15 through 17]. At the conclusion of the evidence by the Commonwealth and at the conclusion of all the evidence, Wright respectively moved to strike the evidence and enter summary judgment of acquittal on the grounds the evidence was insufficient; and these motions were overruled and excepted to by Wright [T-85 through 88; T-156 through 158]. Prior to the closing arguments, it appeared an agent of the Commonwealth had recorded testimony of witnesses for the defense and given the tape to witnesses for the Commonwealth who were sequestered; and an inquiry was made into that matter which continued until after the closing arguments and the jury retired and actually continued until the jury returned [T-9 through 184]. After the verdict, Wright moved to set aside the verdict as contrary to the law and evidence because the evidence was insuffi-

cient and because of the recording of the testimony taken to the sequestered witnesses; and said motion was overruled and excepted to [T-185 through 191].

Wright timely filed a notice of appeal [R-32] and transcript [R-33] and petitioned to the Supreme Court of Virginia to review the final judgment of the trial court; but by order on June 28, 1984, the Supreme Court of Virginia denied the petition for appeal and consequently did not have a full hearing on the questions presented.

B - FACTS

On June 2, 1983 [T-71] Mr. J. F. Huddleston, a patrolman with the City of Roanoke Police Department [T-71] observed Wright operating a 1968 Mercedes Benz, two tone, blue in color, automobile in the 2700 block of Melrose Avenue, Northwest, in the City of Roanoke, Virginia [T-71].

Mr. Huddleston stopped Wright for two reasons. First, he had knowledge there were two misdemeanor warrants on file for Mr. Wright and second he knew Mr. Wright at that time owned two Mercedes Benz vehicles — one being a maroon and tan car and the other being the blue car; and he had been accustomed to seeing Mr. Wright drive the maroon car and had noticed the tag had been on the other or maroom car [T-72]. He requested Mr. Wright leave the vehicle [T-73], confirmed with the Division of Motor Vehicles the tags were properly registered to the blue car then being driven [T-72]; and also confirmed with the local police department there were still two misdemeanor warrants on file for Wright [T-73]. According to his policy when arresting a driver of a car, he conducted a search of the vehicle [T-73]. When he leaned inside the door pursuant to the search, he noticed a bullet on the floor of the car [T-73-74]. He continued

his search by opening the glove compartment on the passenger's side in front of the vehicle; and when he did, he noticed a brown paper bag lying in the glove compartment which obstructed his view of the rest of the contents [T-74]. He put his hand on the bag to move it and when he gripped the bag, he felt there was a gun inside it. He removed what was in fact a fun from the bag [T-76]. The gun was not visible from common observation by the driver of the car [T-78].

On June 25, 1982, Thomas A. Waring, an agent of the Bureau of Tobacco, Alcohol and Firearm Division of the Internal Revenue Service of the U. S. Department of Treasury, fired the gun and found it to be an operative pistol [T-79].

On November 15, 1978, Wright was convicted in the Circuit Court of the City of Roanoke of malicious wounding on June 10, 1978; and Wright used a firearm

to commit the offense [T-81-82; Exhibit No. 3].

The undisputed testimony is that the gun was purchased by Wright's grandmother, Beatrice Randolph, who had the sales ticket from the pawn shop [T-76; T-82; T-90-91; Exhibit No. 1]. According to Mrs. Randolph, she went with her daughter, Sarah Randolph, in the blue automobile owned by Wright for the purpose of moving her son; and when she got into the car, she had with her a bag containing the gun and placed it in the glove compartment of the car [T-91]. When she left the car, she forgot and left the gun in the glove compartment and did not tell Wright about it [T-92]. On cross examination, she had very little knowledge of how the gun worked; but she did indicate the gun had been loaded by her son, Lacy Randolph, and she had left the gun in the same condition it was when he loaded it for her

[T-109].

Sarah Randolph, mother of Wright, confirmed testimony of her mother [T-111-116].

Van Tyrone Wright, brother of Wright, indicated Wright was with him on June 2, 1982 at 2919 Glenrose Avenue; he needed to obtain a collar for his dog; he did not have a car close by; and consequently he went to his grandmother's house to obtain his blue car for the purpose of driving to a store to obtain the dog collar [T-121-129]. At the time, Wright had three cars, a white Lincoln, a red Mercedes and a blue Mercedes. Normally other members of the family drove the blue Mercedes [T-123].

Wright testified he owned said three cars and a wrecked automobile [T-130]. While he preferred to drive the red Mercedes, he usually drove the white Lincoln and seldom drove his blue Mercedes [T-130-131]. For monetary reasons, he

transferred the tags from the red car to the blue car and was selling the red car; and on the day in question, his white Lincoln was being repaired so only the blue car was available. Prior to driving the blue car, he was three blocks away at 2919 Glenrose Avenue when his dog broke loose and he needed to purchase a collar. Consequently he walked to his grandmother's house, three blocks away, obtained his blue car and drove to K-Mart Store and purchased a collar; and on his way returning home, he was stopped by the policeman [T-135-136]. He did not know the gun was in the glove compartment of the car until it was found by the policeman [T-137].

A rebuttal witness, police R. W. Olin, testified on June 2, 1983 that she had seen Wright driving the blue automobile an hour earlier near First Street, Northwest, Roanoke, Virginia [T-144], which would contradict Wright's statement that he merely drove the car from his grandmother's house to the store and was returning home when

stopped by the police officer.

Prior to the trial at a hearing on a motion to suppress, Mr. Huddleston testified as soon as he stopped Wright in his vehicle, another police officer, N. W. Gregory, appeared at the scene. Before he searched the car, Wright was taken to the rear of the car, handcuffed and in the custody of Mr. Gregory [T-41-41; T-26]. Wright had flagged a bystander, Robert L. Swain , to drive the automobile home. [T-14; T-26; T-39]. According to Wright, he gave the keys to Swain [T-14]. According to Swain, the policeman handed him the keys [T-26]. According to Swain, the police were not sure whether to let him drive the car and "while I was there waiting on him to decide what he was going to do, they searched the car" [T-26]. At that time, Wright was still standing at the back of the car between the police car and his car right beside it [T-26]. Basically they would

not let Swain drive the car away until after the police had searched it [T-27]. According to policeman Huddleston, the search had been completed before Mr. Swain approached [T-39]. In any event, there was no dispute: the arrest was for two misdemeanor warrants and not for any crime observed by Mr. Huddleston, Wright was handcuffed and in the custody of Mr. Gregory before Mr.Huddleston began his search, and the car was never impounded but driven away by Mr. Swain.

After the presentation of evidence but before reading of the instructions and closing arguments, the witnesses for the defense who had been sequestered informed counsel for Wright an agent for the Commonwealth had taken a tape recording on several occasions and given it to Mr. Huddleston. Consequently an inquiry was made concerning this and the facts are discussed during the legal argument which appears in Point 2 of the ARGUEMNT in this petition.

V111.ARGUMENT

POINT NO. 1 - THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT A CONVICTION

The due process clause of Amendment XlV, Section 1 of the Constitution of the United States protects an accused against a criminal conviction except upon proof beyond a reasonable doubt as to every fact necessary to constitution the crime for which the accused is charged. *In Re: Winship*, 397 U.S. 358 (1970).

Va. Code § 18.2-308.2 makes it unlawful for certain felons "to knowingly and intentionally possess or transport" a firearm. Wright argued at the trial that an owner or operator of a car in which a gun is found in the glove compartment does not knowingly possess or transport the gun unless he is aware it is in the glove compartment. The trial court apparently agreed with this interpretation of the statute by granting instruction 5B as follows:

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> "THE COURT INSTRUCTS THE JURY that ownership or possession of an accused of an automobile in which there is a firearm not visible to common observation, creates no presumption that the accused did either knowingly or intentionally possess or transport the firearm. However, these are circumstances which can be considered by you, *along with the other evidence*, in determining the accused's guilt or innocence." [R-24; emphasis added].

Wright does not disagree with the interpretation of the statute as defined by the instruction; and because the Commonwealth did not object to the instruction and can not appeal, this instruction is the law of the case, *Hart v. Commonwealth*, 221 Va. 283, 269 S.E. 2d 806 (1980).

The argument of Wright is that there was no "other evidence" to consider along with Wright's ownership and possession of the motor vehicle. The gun was in a paper bag in the glove compartment of the car and driven by Wright but was not visible to him while driving the car. He

had two other cars at the time, and while he drove this particular car on occasions, he drove it less frequently. The uncontradicted evidence is the gun was owned by his grandmother who had access to the car and who testified she left the gun in the car without informing Wright.

In *Clodfelter v. Commonwealth*, 218 Va. 619, 238 S.E. 2d 820 (1977), the Supreme Court of Virginia decided when other evidence was sufficient under a similar statute involving illegal possession of drugs [Va. Code § 18.2-250]. There the contraband was found concealed behind a hanging wall mirror in a motel room rented to Clodfelter. Clodfelter was the only guest registered as occupying the room and he had the key. He also gave a false identity. That court held that while this created suspicion of guilt, it did not show Clodfelter was aware the contraband was behind the mirror; and a conviction on a jury verdict was reversed. The facts

there were much stronger for conviction than in the case at bar. While Wright was the owner and driver and sole occupant of the car, he was not the sole member of his family who used the car and the glove compartment is a place within a car where other users may leave objects. In *Clodfelter*, there was only one key to the room and here numerous persons had access to the automobile. There was simply no evidence Wright was aware the gun was in the glove compartment of the car.

To convict Wright of being aware the gun was in the glove compartment of the car, the evidence must not only be consistent with his guilt but inconsistent with his innocence; and where there is a reasonable doubt of his guilt because evidence is consistent with his innocence, the Supreme Court of Virginia should reverse a con-

viction even though based on a jury verdict. *Garner v. Commonwealth*, 186 Va. 600 (1947).

Thus the conviction of Wright was by insufficient evidence under the laws of the case and is consequently repugnant to the principles of due process required by the Constitution of the United States. *Garner v. Louisiana*, 368 U.S. 157 (1961).

POINT 2 : THE TAPE RECORDINGS OF DEFENSE WITNESSES BY AN AGENT OF THE COMMONWEALTH WHO DELIVERED THEM TO A SEQUESTERED WITNESS REQUIRES REVERSAL OF THE CONVICTION.

Va. Code § 19.2-265.1 requires exclusion from the courtroom of every witness upon motion by either party. Prior to the trial, counsel for the Commonwealth moved for such separation of the witnesses [T-70]. At the conclusion of the evidence and argument of instructions but before reading the instructions and making closing arguments, Wright (by counsel) discovered from the defense witnesses that a law student intern sitting at the Commonwealth attorney's table had left the courtroom with

a tape recorder and given it to police officer, J. T. Huddleston, who was the essential witness for the Commonwealth. The trial court immediately conducted an investigation which was suspended for the purpose of reading the instructions and counsel making closing arguments to the jury. The investigation was then continued.

During the trial, four witnesses testified for Wright who were Beatrice Randolph, Sarah Randolph, Van Tyrone Wright and Wright. Subsequently two rebuttal witnesses testified for the Commonwealth who were policeman R. W. Olin and policeman J. F. Huddleston. At the post-trial investigation, Van Tyrone Wright stated the law student had left the courtroom with a tape recorder and given it to Mr. Huddleston *after* he [Van Tyrone Wright or the third defense witness] testified [T-161]. The law student testified he had left the

courtroom at the conclusion of the Commonwealth's testimony in order to obtain a law book for use by the Assistant Commonwealth Attorney trying the case during the argument on the motion to strike. The jury had been excluded but there was no recess by the trial court. While he was outside, Mr. Huddleston gave him a tape recorder and asked him to record the defense testimony and he did. He gave the tape recording to Mr. Huddleston after the evidence was concluded [T-163-164]. Mr. J. E. Huddleston testified he received the machine back from the student when proceedings were rescessed for lunch and he had not discussed the contents of the tape with anyone [T-168-171]. Pamela Jordan, who was present as a witness for the defense but who did not testify, testified that she was in the hall outside the courtroom during the entire trial. Between the testimony of Beatrice and Sarah Randolph, the law student came out with the

tape recorder and gave a tape to Mr. Huddleston and he came out more than once. Ms. Olin testified she did not know anything about the tape recording. Another witness for the prosecution saw Mr. Huddleston give the tape recorder to the law student but did not see him return it. The incident occurred after that particular witness testified [T-178]. Again the student testified he left to obtain a book at the conclusion of the Commonwealth's testimony and when he returned,was given a tape recorder which he returned to Officer Huddleston at the conclusion of the testimony. He began recording when the first defense witness testified and the batteries eventually ran down [T-181]. A bailiff, Edward Kirk, testified he had been on duty and observed the tape recorder after he removed the jury from the courtroom at the conclusion of the Commonwealth's testimony and the law student remained

seated until both sides rested [T-183]. Another bailiff, John Perdue, testified he observed the law student leave near the end of the trial. [T-184]. According to a page in the transcript, after page 184 dated September 19, 1983, the tape was reviewed and is identical to the testimony transcribed from pages 89 and to page 135. This is well past the portion of the testimony of Wright contradicted by Ms. Olin.

While the aforesaid may not be proof the witnesses for the Commonwealth were improperly using the tape recording, it taints the proceeding for a sequestered witness to have delivered to him a tape recording of the testimony of the opposing witnesses during the course of the trial. It makes a mockery of the separation of the witnesses. If it were used improperly, Wright would not have been able to have proved it particularly when the trial court limited the witnesses on the

inquiry to those which could be immediately produced [T-171].

In *Johnson v. Commonwealth*, 217 Va. 682, 232 S.E. 2d 741 (1977), it was held the statute requiring exclusion of witnesses was mandatory and it was reversible error not to exclude the witnesses. Even though the motion to separate was made by the Commonwealth instead of by Wright, Wright would have made the motion had the Commonwealth not made the motion first; and it is a mockery of the mandatory separation of witnesses for the Commonwealth to move for separation and then deliver tape recordings to its witnesses during the trial. Because it is reversible error to refuse a mandatory request for separation of witnesses without determining whether the failure results in prejudice, proof the tape recorder was listened to and improperly used it not necessary.

Prior to the verdict, the trial court asked Wright if he had any complaint

about the proceedings and he stated:

> "... the onliest complaint I really have is about that man right here with that tape recorder " [T-167].

Even if there was no impropriety by the law student and the policeman, it appeared improper to Wright before he knew of the verdict and accordingly the verdict should have been set aside on the motion made by Wright after the verdict was received [T-191].

Because each state is free to adopt its own procedures, *Snyder v. Massachuettes*, 291 U.S. 97 (1933), a state may be free to adopt its own rule concerning the separation of witnesses without violating concepts of due process of law; but where the Commonwealth has adopted a mandatory requirement of separation of witnesses, the recording of testimony of defense witnesses and delivery of the recording by the prosecution to her witnesses, violates fundamental standards of

fairness and notions of justice which is the test used by this Court to determine if the procedure violates constitutional due process of law. *Rochin v. California*, 342 U.S. 165 (1952).

POINT 3 - THE EVIDENCE OF THE GUN WAS INADMISSIBLE BECAUSE IT WAS THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE.

Wright owned several automobiles. At the time of the alleged offense, Wright was driving one of the automobiles when he was stopped by a police officer who suspected Wright had taken the tags from another automobile and placed them on this car. While there was a conflict in the testimony as to the timing, Wright was also arrested because the policeman was aware of two misdemeanor warrants against Wright on file at the police station. When the policeman stopped Wright, he had Wright leave the automobile and then checked the tags and found them to be all right. He then confirmed the two misdemeanor

warrants were on file and requested they be brought to the scene. At this point, another officer took charge of Wright who was no longer in the automobile and then the policeman went to the automobile to search it. The police did not take custody of the automobile but the keys were given by Wright to a by-stander who drove the car to Wright's home after the arresting policeman had completed his search.

When the policeman went inside the automobile, he noticed a bullet on the floor. When he opened the glove compartment of the automobile, he observed a brown paper bag. When he touched the brown paper bag, he felt a gun inside it and retrieved it. Wright was not then arrested as a felon who possessed the gun; but a warrant was obtained the following day; but Wright was arrested on the two misdemeanor warrants.

Amendment lV of the Constitution of the United States is made applicable to

state criminal proceedings by Amendment XIV, Section 1 of said Constitution; and evidence obtained by an illegal search and seizure in violation of the Fourth Amendment is inadmissible in evidence. *Mapp v. Ohio*, 367 U.S. 463 (1961).

Carroll v. United States, 267 U.S. 132 (1925) and its progeny such as *Brinegar v. United States*, 338 U.S. 160 (1949) and *Chambers v. Maroney*, 399 U.S. 42 (1970) are not applicable. They hold that while there is no general right to stop travelers on the highway, law enforcement officials do have the power to stop a vehicle and search it if they have a reasonable cause to believe the vehicle is transporting contraband and exigent circumstances exist because the mobility of the car makes it impractical to obtain a warrant. On the other hand, where the exigent circumstances do not exist (such as where the driver is arrested and the car is no longer mobile), then a search

warrant is required. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Here, of course, Wright was out of the car and it was not mobile and the policeman was not possessed of any particular facts to believe the car was transporting contraband.

Cooper v. California, 386 U.S. 58 (1967) and its progeny do not apply. These cases hold that when a policeman impounds a motor vehicle or takes custody or possession of a motor vehicle because the driver is arrested, then he might make an inventory search of the vehicle. Here the policeman did not take possession or custody of the vehicle but permitted a bystander to drive it away after the policeman completed his search.

Unquestionably, where a person is lawfully arrested, the police have a right, without a search warrant , to make a contemporaneous search of the person of the accused and surrounding area for weapons

or fruits of or implements used to commit a crime. *Weeks v. United States*, 232 U.S. 383 (1914).

This Court has had occasion to consider searches of automobiles as being incident to the lawful arrest of a driver . In *Preston v. United States*, 376 U.S. 364 (1964), three men were sitting in a parked automobile and were arrested for vagrancy. After they were in jail and the automobile was towed to a garage, the police made a search of the car. That Court held the search was not incident to the arrest but was too remote in time and place. There was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime, assuming there are articles which can be fruits or implements of the crime of vagrancy.

In *Chimel v. California*, 395 U.S. 752 (1969), this Court clarified the rule

as to the area which can be searched as incident to an arrest. There a man was arrested in his home for burglary of a coin shop and the police conducted a search of his entire three bedroom house. Because the search went far beyond the accused's person and the area from which he might have obtained either weapons or something that could have been used as evidence against him, the search was not incident to the arrest. Correspondingly when Wright was no longer in the vehicle and in the custody of another police officer, a search of the glove compartment was not incident to the arrest because the glove compartment was beyond his reach to obtain a weapon or destroy evidence (although the search was not to obtain evidence of the crimes for which Wright was being arrested).

Recently this Court rendered two decisions on the same day concerning

the authority of the police to search an automobile as incident to the lawful custodial arrest of the occupants of a car. In each case, the police stopped the motor vehicle because of erratic or improper driving, smelled marijuana and made arrests pursuant to the probable cause resulting from such smell. Thus in each case, the policeman actually had probable cause to believe contraband was in the car. The facts were quite different from the case at bar because the policeman had no independent probable cause to arrest Wright or search his car but was merely making an arrest pursuant to warrants for past misdemeanors.

The first of the two decisions was *Robbins v. California*, 453 U.S. 520 (1981). There the police officers stopped the driver's stationwagon because he was driving erratically, smelled marijuana smoke, patted the individual down and dis-

covered a vial of liquid and then searched the passenger compartment of the car and found marijuana. After arresting the individual and placing him in the patrol car, the officer opened the tail gate of the stationwagon, located a handle set flush in the deck and lifted it to uncover a recessed luggage compartment. In the compartment were two packages wrapped in green opaque plastic which the officers then unwrapped and found to contain bricks of marijuana. This Court held the container, whose contents were not obvious to an observer, could not be opened without a warrant even when found during the lawful search of an automobile; and the opening of the closed container was an illegal search.

The second decision was *New York Vent v. Belton*, 453 U.S. 454 (1981). There a policeman stopped an automobile for speeding, checked the driver's license and

registration, smelled burnt marijuana, and observed an envelope on the floor of the vehicle which he associated with marijuana. Based on the probable cause of smelling the burnt marijuana, the policeman directed the occupants out of the car and then searched the passenger compartment of the car where he found on the back seat a black leather jacket belonging to one of the occupants, unzipped one of the pockets and discovered cocaine. This Court held, as an incident to the arrest, the policeman could search the passenger compartment of the automobile and examine the contents of any container found within the passenger compartment. In that case, the search was for fruits of the crime for which the arrest was made. While the distinction is slight, in the case at bar, the gun was not in the passenger compartment of the car but was in the glove compartment. The glove compartment

was a place beyond the rearch of Wright at the time of the search. Because Wright had given the keys to another to drive the car away, there was no particular point of this search and consequently it constituted an unreasonable invasion of the privacy of Wright. Even when the brown bag containing the gun was found, the gun was not visible until the bag was opened. Even if the officer could suspect the bag contained a gun by feeling it from the outside, it was not contraband and no arrest was mase of Wright for transporting or possessing the gun. This was a hindsight development.

Thus this case is more like *Robbins* and less like *Belton*, but it is distinguished from both because, in those cases, the policeman was searching for fruits of the crime, but in this case, he was not.

From all testimony of the police,

it was obvious they wished to stop Wright in his automobile for the purpose of investigation. Instead of serving the misdemeanor warrants on him at home or asking him to come to the police station, the police waited until he was in his automobile and then stopped him attempting to find some excuse to search his car. First it was a changed tag and then it was warrants on file at the police station; and even after Wright was under arrest and the keys had been given to another to drive the car away, the police wished to search the automobile before releasing it. Obviously the arrest, even though lawful, was merely a pretext for investigatory purposes. As stated by Mr. Justice Butler in *United States v. Lefkowitz*, 285 U.S. 452 (1932) (where the police made an arrest pursuant to a valid warrant and then searched and seized papers in the room):

"An arrest may not be used as

> a pretext to search for evidence." 285 U.S. at page 467.

Accordingly the evidence of the fun found in the glove compartment of the automobile was inadmissible as the product of an illegal search and seizure and violated Wright's rights under the Constitution of the United States.

POINT 4: THE STATUTE WAS INTENDED ONLY TO PROHIBIT POSSESSION OF A GUN BY PERSONS CONVICTED OF A FELONY AFTER ITS ENACTMENT.

In *Sturges v. Carner*, 114 U.S. 511, 29 L.2d 240 (1885), this Court cited the opinion of Justice Story in defining a retrospective statute as follows:

> "... every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." 114 U.S. at page 519.

In that case, it was held that an Ohio statute permitting audits of prior tax returns to determine if they were false

under laws in existence at the time the returns were filed was procedural and thus not retrospective.

The Supreme Court of Virginia has repeatedly recognized the rule. For example, in *Paul v. Paul*, 214 Va. 651, 203 S.E. 2d 123 (1974), it held:

> "... new laws, except as to matters of remedy which may be applied retrospectively, are usually presumed to be prospective and not retrospective in their operation... This principle of law is recognized in Code § 1-16 which provides that no new law shall affect 'any right accrued or claim arising' before the effective date of the new law". 214 Va. at page 653.

A former statute corresponding to Va. Code § 1-16 was held to apply to both criminal and civil cases. *White's Adm'x v. Freeman*, 79 Va. 597 (1884).

Penal statutes are to be strictly construed; and if such a statute can be reasonably interpreted in favor of the party accused, such interpretation is preferred. *United States v. Enmons*, 410

U.S. 396, 411 (1973).

Thus even if the General Assembly could have made Va. Code § 18.2-308.2 apply to any person who has been "heretofore or hereafter" convicted of a felony involving the use of a firearm, the legislature declined to use such retrospective words and consequently the statute must be construed as only applying to a person who has been convicted of such a felony after the enactment of the statute in 1979. Wright's offense and conviction were in 1978.

POINT 5: THE STATUTE IS EX POST FACTO LAW IF APPLIED TO FELONIES COMMITTED PRIOR TO ITS ENACTMENT.

Article 1, Section 10, Clause 3 of said Constitution limits the power of states to pass an ex post facto law. This federal constitutional prohibition relating to states applies not only to state legislation, but also to the people of the states in adopting constitutions or making changes in the fundamental law; and provisions in

new constitutions and references to past offenses will not be permitted to have the effect of repealing the prior ones so as to deprive accused persons of any rights formerly secured by fundamental law. *Kring v. Missouri*, 107 U.S. 221, 17 L.Ed 506 (1883) (holding Missouri procedure statute is an ex post facto law when the law in Missouri in force at the time of a plea of guilty to murder in the second degree was an acquittal of murder in the first degree even though the plea was set aside on appeal and the law changed.)

The Congress of the United States is also prohibited from enacting an ex post facto law by Article 1, Section 9, Clause 3 of the United States Constitution; and judicial decisions defining ex post facto laws enacted by Congress are also applicable to the definition of ex post fact laws prohibited to states. An ex post facto law is one which (i) makes an act

done before the passing of the law, and which was innocent when done, criminal; or (ii) aggravates a crime or makes it greater than it was when committed; or (iii) changes a punishment and inflicts a greater punishment than the law annexed to the crime when committed; or (iv) alters the rules of evidence or permits receipt of less or different testimony than was required to convict at the time the offense was committed. *Calder v. Bull*, 3 Call, 386, 390; 1 L.Ed 648, 650 (1798). More particularly, an ex post facto law is one which imposes punishment for an act which was not punishment at the time it was committed, or imposes a punishment in addition to that prescribed. *Burgess v. Salmon*, 7 Otto, 381, 24 L.Ed 1184 (1878). The argument here is that prohibiting Wright from possessing or transporting a gun inflicts a greater punishment or an additional punishment to that prescribed at

the time he committed the offense or even at the time he was sentenced or convicted.

There is overwhelming precedent for Wright's argument. In *Cummings v. Missouri*, 4 Wall 277, 8 L.Ed 356 (1867), the Supreme Court of the United States held a disqualification from office or from pursuits of a lawful occupation is a punishment; and a statute which required an oath of a past loyalty to the United States as a condition of holding an office or pursuing a lawful conviction (acting as a clergyman) was an ex post facto law. In *Ex Parte: Garland*, 4 Wall 333, 18 Ld. 366 (1867) the Court similary held a statute requiring an oath of past loyalty to the United States as a condition of continuing to practice law before the Court was an ex post facto law. The statute had no relation to the fitness of the lawyer to continue his practice. These rulings were affirmed in *Pierce v. Carskaden*, 16 Wall 234, 21 Ld

276 (1873).

Under normal logic, the statute here involved is obviously an ex post facto law. The confusion lies in the holding of *Hawker v. New York*, 170 U.S. 189 42 L.Ed 102 (1898). In that case, the Supreme Court of the United States merely ruled stating New York had a right to define the qualifications to practice medicine. As part of such qualifications, New York could require good character as a condition of practicing medicine, and in determining good character, it could decide what was evidence of bad character such as the conviction of a crime. In that case, a physician had been convicted of committing an abortion prior to the enactment of the New York statute prohibiting felons from practicing medicine. The statute making such previous conviction a disqualification from practicing medicine was held not to be a punishment but simply

an exercise of proper police power. The distinguishing feature between additional punishment and police power was whether the regulation was reasonable in determining fitness to practice medicine. However, Justice John Marshall Harlan wrote a vigorous dissent, logically showing the statute inflicted additional punishment by denying a physician the right to engage in his profession. It is interesting to note that Justice Harlan also wrote a vigorous dissent two years earlier in *Plessy v. Ferguson,* 163 U.S. 537, 41 L. Ed 256 (1896) and the dissent was adopted as the law of the land in *Brown v. Board of Education,* 347 U.S. 483, 98 L. Ed 872 (1954). Obviously it is now time to make another of his famous dissents the law of the land.

The precise issue of whether a gun law is an ex post facto law was decided in *Cases v. United States,* 131 F.2d 916 (1942) cert den 319 U.S. 770, 87 L.Ed. 1768

(1948) reh den 324 U.S. 889, 89 L. Ed 1437 (1945). In that case, the First Circuit held, applying the principles of *Hawker v. New York, supra:*

> "Thus, if the past conduct which is made the test of the right to engage in some activity in the future is not the kind of conduct which indicates unfitness to participate in the activity, it will be assumed, as it must be, that the purpose of the statute is to impose an additional penalty for past conduct. If, however, the past conduct can reasonably be said to indicate unfitness to engage in the future activity the assumption will be otherwise." 131 F.2d at page 921.

That court then held a gun law was not an ex post facto law by noting that it was a valid exercise of the power to regulate commerce by prohibiting the use of fire-arms to those who by their past conduct had demonstrated an unfitness to being trusted with such dangerous instrumentalities. First, it is submitted that the rationale is erroneous because the statute inflicts

an additional penalty for past activity. Any statute creating a crime is based on a finding that citizens by their past conduct have made it necessary to outlaw the activity in the future; but punishment is never inflicted again for the past acitvity. An occasional exception to regulate specialized activity (such as the practice of medicine) cannot be broadened to exceptions for any general activity the legislature may regulate. Otherwise there can never be an ex post facto law. Second, it is submitted that even if the rationale of the First Circuit is correct, the statute then being scrutinized only prohibited the possession of firearms by persons convicted of "murder, manslaughter, rape, mayhem" and similar offenses and persons who demonstrate a need for firearms could obtain relief from the prohibition. Thus there was a rational connection between the past activity and unfitness to possess

a gun. Va. Code § 18.2-308.2 contains no "bail-out" provision but merely inflicts punishment for past activity.

Mr. Justice Harlan in his aforementioned dissenting opinion in *Hawker v. New York, supra,* wrote as follows:

> "The statute... takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practice medicine. The offender may have become... a new man in point of character, and so conducted himself as to win the respect of his fellow men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree..." 170 U.S. at page 204.
>
> "Assuming for the purpose of the argument, that the legislature may require for the continuance of the practice of medicine, that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such requirement must relate to a present status or condition of a person coming within the

terms of the act." 170 U.S. at page 204.

It is clear Justice Harlan felt that the statute then in question seized upon a past offense and made that alone the substantial ingredient of a new crime. 179 U.S. at page 205.

By denying appeals or writs of certiorari, this Court may technically have held a gun law is not an ex post facto law; but this Court has published no opinion and consequently has not decided this very important issue. The question should be decided although under the statute herein involved, it could be held constitutional by being interpreted it as providing a "clean slate" at the time of its enactment.

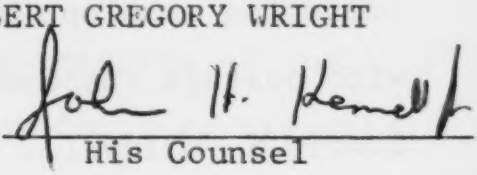
IX. CONCLUSION

By denying the petition for appeal, the Supreme Court of Virginia not only denied justice to the Petitioner but also

erroneously decided federal questions of fundamental importance. Accordingly the administration of justice requires this Court to grant a writ of certiorari to review that judgment.

Respectfully submitted,

ROBERT GREGORY WRIGHT

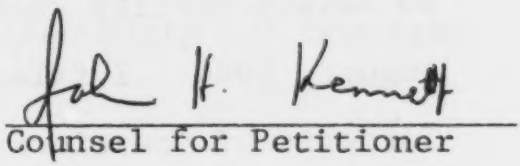
By 
His Counsel

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, Virginia 24011
Counsel for Petitioner

X. PROOF OF FILING AND SERVICE

I, John H. Kennett, Jr., counsel for the Petitioner and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 27th day of August, 1984: I filed the foregoing petition for writ of certiorari with the Clerk of the Supreme Court of the United States by mailing forty copies of same together with the filing fee in a duly addressed envelope by first class mail with postage

thereon prepaid addressed to Alexander L. Stevas, Clerk, Supreme Court of the United States, 1 First Street, Northeast, Washington, D.C. 20543; and also served a true copy of the foregoing petition on the Respondent, Commonwealth of Virginia, by mailing three copies of same in a duly addressed envelope by first class mail with postage thereon prepaid addressed to Donald S. Caldwell, Commonwealth's Attorney, Roanoke City Courthouse, 315 Church Avenue, Southwest, Roanoke, Virginia, and by mailing three additional copies of same in a duly addressed envelope by first class mail with postage thereon prepaid addressed to Gerald L. Baliles, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia.



Counsel for Petitioner

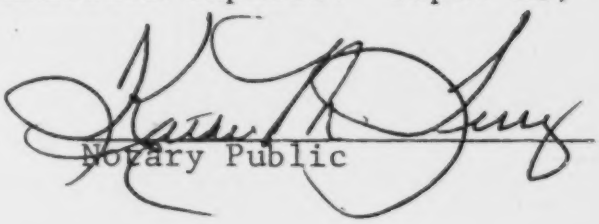
STATE OF VIRGINIA,

CITY OF ROANOKE, TO-WIT:

The foregoing proof of filing and service was subscribed and sworn to before

me by John H. Kennett, Jr., this 27th day of August, 1984.

My commission expires: Sept. 23, 1984.



Notary Public

XI: APPENDIX

The appendix consists of the judgment of the Supreme Court of Virginia sought to be reviewed; and the assignments of error which were the basis for the questions presented to that Court in the petition for appeal *In Re: Winship, supra,* was cited thereby raising the federal question hereby presented in the fourth, fifth and sixth assignments of error; and the federal questions are obvious in the other assignments of error.

A P P E N D I X

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON THURSDAY, THE 28TH DAY OF JUNE, 1984.

ROBERT GREGORY WRIGHT,

Appellant

against Record No. 831719
Circuit Court No. FL-82-0900

COMMONWEALTH OF VIRGINIA,

Appellee

From the Circuit Court of the City of Roanoke

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal. Code § 8.01-675.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Deputy Clerk

Wright assigns the following as error committed by the trial court:

(1) The ruling of the trial court on January 3, 1983 by which it failed to dismiss the charge on the grounds the statute has prospective application only in defining who is a felon proscribed from possessing or transporting a gun. [R-9].

(2) The ruling of the trial court on January 3, 1983 by which it failed to dismiss the charge on the grounds the statute if applied retrospectively would be an ex post facto law [R-9].

(3) The ruling of the trial court permitting the introduction of the gun into evidence when it was the product of an illegal search and seizure in violation of the Constitution of the United States of America and statutes of the Commonwealth of Virginia.

(4) The failure of the trial court to strike the evidence of the Common-

wealth at the conclusion of the evidence of the Commonwealth on the grounds the evidence was insufficient to convict [R-85 through 88].

(5) The failure of the trial court to strike the evidence of the Commonwealth at the conclusion of all the evidence on the grounds the evidence was insufficient to convict [T-156 through 158].

(6) The failure of the trial court to set aside the verdict as contrary to the law and evidence because the evidence was insufficient to convict [T-185 through 191].

(7) The failure of the trial court to set aside the verdict as contrary to the law and evidence because of the tape recording of the defense witnesses by an agent of the Commonwealth given during the trial to a witness for the Commonwealth who was sequestered [T-185 through 191].